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HOUSE BILL 211

48TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2008

INTRODUCED BY

Ben Lujan

AN ACT

RELATING TO TAXATION; AMENDING REQUIREMENTS FOR QUALIFYING
EXPENDITURES FOR THE FILM PRODUCTION TAX CREDIT; CREATING A
GROSS RECEIPTS TAX EXEMPTION FOR FILM PERFORMING ARTIST
ENTITIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 7-2F-2 NMSA 1978 (being Laws 2003,
Chapter 127, Section 2, as amended) is amended to read:

"7-2F-2. DEFINITIONS.--As used in Chapter 7, Article 2F
NMSA 1978:

A. "commercial audiovisual product" means a film or
a videogame intended for commercial exploitation;

B. "direct production expenditure" means a
transaction that is subject to taxation in New Mexico,
including:

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1 (1) payment of wages, fringe benefits or fees
2 for talent, management or labor to a person who is a New Mexico
3 resident for purposes of the Income Tax Act;

4 (2) payment to a [~~personal services~~
5 ~~corporation~~] film performing artist entity for the services of
6 a performing artist if the entity:

7 (a) [~~the personal services corporation~~]
8 pays gross receipts tax in New Mexico on the portion of those
9 payments qualifying for the tax credit; and

10 (b) [~~the performing artist receiving~~
11 ~~payments from the personal services corporation pays New Mexico~~
12 ~~income tax~~] deducts and remits withheld income tax pursuant to
13 Subsection D of Section 7-3-12 NMSA 1978; and

14 (3) any of the following provided by a vendor:

15 (a) the story and scenario to be used
16 for a film;

17 (b) set construction and operations,
18 wardrobe, accessories and related services;

19 (c) photography, sound synchronization,
20 lighting and related services;

21 (d) editing and related services;

22 (e) rental of facilities and equipment;

23 (f) leasing of vehicles, not including
24 the chartering of aircraft for out-of-state transportation;
25 however, New Mexico-based chartered aircraft for in-state

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1 transportation directly attributable to the production shall be
2 considered a direct production expenditure;

3 (g) food or lodging;

4 (h) commercial airfare if purchased
5 through a New Mexico-based travel agency or travel company for
6 travel to and from New Mexico or within New Mexico that is
7 directly attributable to the production;

8 (i) insurance coverage and bonding if
9 purchased through a New Mexico-based insurance agent; and

10 (j) other direct costs of producing a
11 film in accordance with generally accepted entertainment
12 industry practice;

13 C. "federal new markets tax credit program" means
14 the tax credit program codified as Section 45D of the United
15 States Internal Revenue Code of 1986, as amended;

16 D. "film" means a single media or multimedia
17 program, excluding advertising messages other than national or
18 regional advertising messages intended for exhibition, that:

19 (1) is fixed on film, digital medium,
20 videotape, computer disc, laser disc or other similar delivery
21 medium;

22 (2) can be viewed or reproduced;

23 (3) is not intended to and does not violate a
24 provision of Chapter 30, Article 37 NMSA 1978; and

25 (4) is intended for reasonable commercial

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1 exploitation for the delivery medium used;

2 E. "film performing artist entity" means a business
3 organization that receives payments for the services of a
4 performing artist;

5 [~~E-~~] F. "film production company" means a person
6 that produces one or more films or any part of a film; and

7 [~~F-~~] G. "postproduction expenditure" means an
8 expenditure for editing, Foley recording, automatic dialogue
9 replacement, sound editing, special effects, including
10 computer-generated imagery or other effects, scoring and music
11 editing, beginning and end credits, negative cutting,
12 soundtrack production, dubbing, subtitling or addition of sound
13 or visual effects; but not including an expenditure for
14 advertising, marketing, distribution or expense payments."

15 Section 2. Section 7-3-2 NMSA 1978 (being Laws 1990,
16 Chapter 64, Section 1, as amended) is amended to read:

17 "7-3-2. DEFINITIONS.--As used in the Withholding Tax Act:

18 A. "department" means the taxation and revenue
19 department, the secretary of taxation and revenue or any
20 employee of the department exercising authority lawfully
21 delegated to that employee by the secretary;

22 B. "employee" means either an individual domiciled
23 within the state who performs services either within or without
24 the state for an employer or, to the extent permitted by law,
25 an individual domiciled outside of the state who performs

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1 services within the state for an employer;

2 C. "employer" means a person, or an officer, agent
3 or employee of that person, having control of the payment of
4 wages, doing business in or deriving income from sources within
5 the state for whom an individual performs or performed any
6 service as the employee of that person, except that if the
7 person for whom the individual performs or performed the
8 services does not have control over the payment of the wages
9 for such services, "employer" means the person having control
10 of the payment of wages;

11 D. "film performing artist entity" means a business
12 organization that receives payments for the services of a
13 performing artist for purposes of the film production tax
14 credit;

15 [~~D.~~] E. "Internal Revenue Code" means the Internal
16 Revenue Code of 1986, as amended;

17 [~~E.~~] F. "owner" means a partner in a partnership
18 not taxed as a corporation for federal income tax purposes for
19 the taxable year, a shareholder of an S corporation or of a
20 corporation other than an S corporation that is not taxed as a
21 corporation for federal income tax purposes for the taxable
22 year, a member of a limited liability company or any similar
23 person holding an ownership interest in any pass-through
24 entity;

25 [~~F.~~] G. "pass-through entity" means [~~any~~] a film

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1 performing artist entity or a business association other than:

2 (1) a sole proprietorship;

3 (2) an estate or trust;

4 (3) a corporation, limited liability company,
5 partnership or other entity not a sole proprietorship taxed as
6 a corporation for federal income tax purposes for the taxable
7 year; or

8 (4) a partnership that is organized as an
9 investment partnership in which the partners' income is derived
10 solely from interest, dividends and sales of securities;

11 ~~[G.]~~ H. "payor" means ~~[any]~~ a person making payment
12 of a pension or annuity to an individual domiciled in New
13 Mexico;

14 ~~[H.]~~ I. "payroll period" means a period for which a
15 payment of wages is made to ~~[the]~~ an employee by ~~[his]~~ the
16 employee's employer;

17 ~~[I. "person" means any individual, club, company,
18 cooperative association, corporation, estate, firm, joint
19 venture, partnership, receiver, syndicate, trust or other
20 association and, to the extent permitted by law, any federal,
21 state or other governmental unit or subdivision or an agency,
22 department or instrumentality thereof;]~~

23 J. "wagerer" means any person who receives winnings
24 that are subject to withholding;

25 K. "wages" means remuneration in cash or other form

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1 for services performed by an employee for an employer;

2 L. "winnings that are subject to withholding" means
3 "winnings which are subject to withholding" as that term is
4 defined in Section 3402 of the Internal Revenue Code;

5 M. "withholdee" means:

6 (1) an individual domiciled in New Mexico
7 receiving a pension or annuity from which an amount of tax is
8 deducted and withheld pursuant to the Withholding Tax Act;

9 (2) an employee; and

10 (3) a wagerer; and

11 N. "withholder" means a payor, an employer or any
12 person required to deduct and withhold from winnings that are
13 subject to withholding."

14 Section 3. Section 7-3-12 NMSA 1978 (being Laws 1999,
15 Chapter 14, Section 3, as amended) is amended to read:

16 "7-3-12. INFORMATION RETURN REQUIRED FROM PASS-THROUGH
17 ENTITY--WITHHOLDING.--

18 A. A pass-through entity doing business in this
19 state shall file an annual information return with the
20 department on or before the due date of the entity's federal
21 return for the taxable year. The information return shall be
22 signed by the business manager or one of the owners of the
23 pass-through entity.

24 B. The information return required by this section
25 shall contain all information required by the department,

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1 including:

- 2 (1) the pass-through entity's gross income;
3 (2) the pass-through entity's net income;
4 (3) the amount of each owner's share of the
5 pass-through entity's net income; and
6 (4) the name, address and tax identification
7 number of each owner entitled to a share of net income.

8 C. A pass-through entity shall provide to each of
9 its owners sufficient information to enable the owner to comply
10 with the provisions of the Income Tax Act and the Corporate
11 Income and Franchise Tax Act with respect to the owner's share
12 of net income.

13 D. The pass-through entity shall deduct and
14 withhold from each nonresident owner's share of net income, or
15 from each payment, excluding wages, by a film performing artist
16 entity, an amount equal to the owner's share of net income
17 multiplied by [~~a rate set by department regulation. In~~]:

18 (1) the highest rate for single individuals
19 provided in Section 7-2-7 NMSA 1978 in the case of a payment,
20 excluding wages, by a film performing artist entity or an owner
21 that is an individual or entity not taxed as a corporation for
22 federal income tax purposes for the taxable year [the rate
23 shall not exceed the rate for composite returns. In]; or

24 (2) except for a film performing artist
25 entity, the highest rate provided in Section 7-2A-5 NMSA 1978

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1 in the case of an owner that is a corporation or other entity
2 taxed as a corporation for the taxable year [~~the rate shall not~~
3 ~~exceed the maximum rate for corporate income tax~~].

4 E. The provisions of Subsection D of this section
5 shall not apply with regard to:

6 (1) the share of net income of a nonresident
7 owner, other than the owner of a film performing artist entity,
8 that has executed an agreement in accordance with regulations
9 or instructions of the department that the owner will report
10 and pay tax, if required, on its own return pursuant to the
11 Income Tax Act or the Corporate Income and Franchise Tax Act;

12 (2) oil and gas proceeds subject to the Oil
13 and Gas Proceeds Withholding Tax Act; or

14 (3) a publicly traded partnership as defined
15 in Subsection (b) of Section 7704 of the Internal Revenue Code,
16 as may be amended or renumbered, and that is not treated as a
17 corporation pursuant to that section.

18 F. Amounts deducted from the owner's share of net
19 income under the provisions of this section shall be a
20 collected tax. No owner shall have a right of action against
21 the pass-through entity for any amount deducted and withheld
22 from the owner's share of net income."

23 Section 4. A new section of the Gross Receipts and
24 Compensating Tax Act is enacted to read:

25 "[NEW MATERIAL] EXEMPTION--GROSS RECEIPTS TAX--FILM

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1 PERFORMING ARTIST ENTITY.--Receipts of a film performing artist
2 entity from another film performing artist entity for the
3 services of a performing artist shall be exempt from the gross
4 receipts tax. As used in this section, a "film performing
5 artist entity" is a business organization that receives
6 payments for the services of a performing artist for purposes
7 of the film production tax credit."

8 Section 5. EFFECTIVE DATE.--The effective date of the
9 provisions of this act is July 1, 2008.

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